September 9, 2013

Dr. Ernie Steinauer, Chair
Nantucket Conservation Commission
4 Bathing Beach Road
Nantucket, MA 02554

Re: NOI, Baxter Road and Sconset Bluff Storm Damage Prevention Project

Dear Dr. Steinauer:

My husband, William Crispin, and I own a home on King Street in Sconset, and spoke in support of this NOI at the public hearing held on August 28, 2013. This letter is submitted to further explain the reasons we offered in support of the application. First, we believe that the Commission is required to evaluate the application under the standard set forth in 310 CMR 10.30(3) of the state wetlands regulations, and not the more restrictive local rules. The failure to do so could ultimately require the town to compensate the land owners for any resulting loss of their homes. Second, we believe that the project would actually enhance the recreational interests of the public because it will preserve the Sconset Bluff Walk, which is an exquisite island treasure. It will also potentially enhance access to the beach below the bluff.

The Commission Should Not Apply the Local Rules Governing Coastal Banks and Beaches. It is obviously essential as a threshold matter to determine which performance standards govern this application. We are aware that some opponents of the application have urged the Commission to apply local rules that establish substantially more restrictive standards for coastal engineering structures than the standards set forth in the state wetlands regulations. *See* Nantucket Land Council Letter of July 30, 2013. The Commission should reject that view and apply the standard in the state regulations that *mandates* approval of the revetment as long as it uses "best available measures" to minimize any adverse effects and no other method for protecting the pre-1978 homes is feasible. 310 CMR 10.30(3). The regulations make clear that the project must be approved *despite potentially adverse effects on coastal beaches*, including changes in "the form of any . . . coastal beach or an adjacent or downdrift coastal beach," when best available measures are used to minimize those effects. *See*, 310 CMR 10.27(3) (precluding certain adverse effects on coastal beaches with the express exception of projects authorized under 310 CMR 10.30(3)(a)).

Our views on this issue are informed by our professional experiences as lawyers in Washington, D.C. I have spent more than thirty years as an appellate lawyer, previously served as a Deputy Solicitor General of the United States, and have argued over twenty cases in the United States Supreme Court. Many of the cases I have handled involved interpretation of statutes and regulations as well as constitutional issues, including regulatory takings of private property. We have seen far too many controversies produce years of protracted litigation and vast expenditures on legal fees because an agency did not apply the correct standard at the outset. In this special setting, the risks of error also threaten the loss of some of the most beautiful

summer homes in the country, and these homes materially enhance the charm of our special community.

Although the Commission is ordinarily permitted to supplement the minimum standards established by the state wetlands regulations, it is well established that local governments nonetheless do not have authority to apply additional rules that are "inconsistent" with specific provisions of state laws or regulations. *See, e.g., Fafard v. Conservation Commission of Barnstable,* 432 Mass. 194, 200 (2000). As *Fafard* indicates, a local rule would be "inconsistent" with state law if a municipality denied permission to proceed with a project under circumstances where the state law expressly provides "that municipalities may [not] deny permission." *Id.* That is the case here. Even though nearly all of the state wetlands regulations establish minimum standards by providing that the conservation commissions may only allow various projects if certain state standards are met, 310 CMR 10.30(3) is an exception to the general rule, and expressly provides that a revetment *"shall be permitted"* by the local conservation commission "provided that *the following* requirements are met." This Commission accordingly has no authority to deny permission based on additional, more stringent requirements. *See also, Boston Gas Co. v. Somerville,* 420 Mass. 702, 704-706 (1995) (finding certain local rules that "imposed conditions beyond those established" by "particular provisions" of the state statute or regulations to be "inconsistent" and unenforceable).

The Commission should not resist this interpretation of the governing law because there are critically important reasons for the rule. Private property is expressly protected by the takings clause of the Constitution, and this section of the law serves to reduce the potential that wetlands regulations will contribute to the destruction of private homes and impose the formidable burden of monetary compensation for the loss on the public. As the Supreme Court explained in *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1015-16 (1992), when land use regulations serve to destroy the value of property, there has been an unconstitutional "regulatory taking" even where the state regulations "advance[] legitimate state interests." The Court emphasized that governments must pay just compensation "when the owner of property has been called upon" by virtue of land use regulations "to sacrifice all economically beneficial use in the name of the common good." *Id.* at 1019. Nor is there any question that takings principles apply in the context of revetment regulations. By way of example, the Supreme Judicial Court of Massachusetts held in *Wilson v. Commonwealth,* 413 Mass. 352 (1992), that a landowner who lost his home in a storm had stated a claim for an unconstitutional taking based on allegations that the state had unreasonably delayed action on a request to build a revetment in Chatham. We accordingly urge the Commission to respect these constitutional and regulatory principles.

The Proposed Project Would Serve to Promote and Protect the Recreational Interests of the Public. As a summer resident of Sconset and an avid walker, I am very familiar with the recreational usage of the areas that would be directly affected by the proposed project. Although the Nantucket Land Council asserts in its letter of July 30, 2013 that the potential loss of the beach directly below the revetment demonstrates that there is an "adverse effect on recreation," that view fails to take all the relevant factors into account. It is far more important to the recreational interests of the community to do what we can to save the Bluff

Walk than to protect, at all costs, a relatively small section of inaccessible beach that is seldom used.

It is certainly desirable to preserve the beach below the proposed revetment and it is my understanding that the proposal has been designed to do that. But even if the beach would be narrowed or lost, the project would still benefit recreational interests overall. If the revetment is not built, it is obvious that we will continue to lose more and more of the Bluff Walk due to erosion. I do not think there can be any serious question that the Bluff Walk has far greater recreational value to the community than the strip of beach below the proposed revetment. For example, the New York Times advised its readers on July 13, 2010, that if they only have 36 hours in Nantucket that they should include a visit to the Bluff Walk because "a stroll there is breathtaking," and lamented the fact that "erosion has left its mark" by requiring the closure of the last third of a mile. Similarly, the April 2000 issue of Travel and Leisure describes the Bluff Walk as the best walk in Nantucket. The opinions of these leading travel writers are confirmed by usage. I typically walk all or part of the path several times per week. It is not crowded (thankfully), but I usually see others enjoying its splendor. Indeed, the Sconset Bluff Walk Public Access Subcommittee of this Commission reported that there were as many as 200 visitors to the Bluff Walk per day during a week in August of 2010. *See* report attached to Minutes of 10/26/2010 meeting.

In stark contrast, the section of beach below the revetment is so inaccessible that it is rare to see anyone walking there. I often walk on the beach below the bluff, but I have only walked as far north as the start of the proposed revetment a limited number of times. That is because the only good public access to this beach is at the north end of Codfish Park. It is a long walk through the sand to the area where the revetment would be constructed and then there is no way up the bluff in that location so a walker has to continue back to Codfish Park. (I was told that 55 Baxter has steps accessible to the public but a sign on the steps states it has been closed due to dangers caused by erosion.) If I could reach Baxter Road for my return back to the village by climbing up steps on the revetment, I would definitely walk on the beach below the bluff more frequently. I am confident other visitors and residents of the village would do the same. It accordingly makes little sense to sacrifice more of our extraordinary Bluff Walk to erosion in an effort to save the full width of this inaccessible section of beach.

We urge you to approve the project, which will serve the best interests of the community as a whole, and thank you for considering our views.

Respectfully submitted,

Maureen Mahoney
William Crispin